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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. [redacted] 115

JOHN A. HAYS,

Petitioner,

v.

ROBERT B. ANDERSON, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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JUNE 12, 1959.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Regulations Involved	2
Statement of the Case	3
1. *Proceedings Below*	3
2. *Petitioner's Government Service*	3
3. *Charges Against Petitioner and Proceedings Thereon*	3
4. *The Appeal Proceedings*	4
Reasons For Granting The Writ	7
A. *The Secretary Failed to Comply with his own Regulations*	8
B. *An Authoritative Construction of the Grievance Procedure By This Court Is Required*	14
Conclusion	16
Appendix A	17
Appendix B	18
Appendix C	19
Appendix D	21
Appendix E	24
Appendix F	29
Appendix G	32

CITATIONS

Cases:

Accardi v. *Shaughnessy*, 347 U. S. 260, 267	7, 8, 14
Bank of U. S. v. *Dandridge*, 25 U. S. 63	11
Bilokumsky v. *Tod*, 263 U. S. 149, 155	8
Bridges v. *Wixon*, 326 U. S. 135, 153	8
Chapman v. *Sheridan-Wyoming Co.*, 338 U. S. 621	8
Coleman v. *Brucker*, 257 F. 2d 661, 662 (C.A.D.C., 1958)	14

	Page
W. H. Goff Co. v. *Lamborn Co.*, 281 F. 613, 616 (C.C.A. 5, 1922), cert. den. 260 U. S. 734	15
Exhibit Supply Co. v. *Ace Corp.*, 315 U.S. 126, 128	15
Farmers' & M. Bank v. *Federal Reserve Board*, 262 U. S. 649, 662	11
Muncie Gear Co. v. *Outboard Co.*, 315 U. S. 759, 655	15
Schriber Co. v. *Cleveland Trust Co.*, 305 U. S. 47, 50	15
Service v. *Dulles*, 354 U. S. 363	7; 8, 14
Supervisors v. *United States*, 71 U.S. 435	11
Terre Haute & Ind. R. Co. v. *Indiana*, 194 U. S. 579	11
Vitarelli v. *Seaton*, No. 101, 1958 Term	7, 8, 14
U. S. v. *Lexington Mills & E. Co.*, 232 U. S. 399	11
Watson v. *United States*, 355 U. S. 14	7

Statutes:

5 U. S. C. 652(a)	9
5 U. S. C. 863	9
28 U. S. C. 1254 (1)	1
28 U. S. C. 1391 (b)	15

Miscellaneous:

5 C.F.R. 22.402 (1958 Cum. Supp.)	9
DIR-JAX-Memo. No. 54-29, Adm. No. 16, Supp. No. 1, Dec. 15, 1954	12
Executive Order No. 9830	10
Federal Personnel Manual	10
Treasury Department Memorandum No. 54-29	12
Treasury Department Personnel Circular No. 165	6
Webster's New International Dictionary, 2nd Unabr. Ed., 1957, p. 1517	11

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ROBERT B. ANDERSON, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on December 24, 1958.

Opinions Below

The order of the District Court is unreported. The opinion of the Court of Appeals, printed in Appendix A attached hereto, is reported at 262 F. 2d 725.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The judgment of the Court of Appeals was en-

tered on December 24, 1958 (R. 42). A petition for rehearing was denied on February 12, 1959 (R. 50). This Court by order of May 5, 1959, granted petitioner an extension of time in which to file a petition for certiorari until June 13, 1959 (Appendix B, attached hereto).

Question Presented

The Secretary of Treasury, acting through designated subordinates, denied the opportunity of a hearing before a grievance committee which was timely sought by an employee, in the classified Civil Service system without veteran's preference, who was contesting his discharge. The question is whether the Secretary must comply, and if so, whether he has complied, with his regulations which provided that such a hearing may be held when requested, except in the case of trivial complaints.

Regulations Involved

This case involves:

(1) Executive Order No. 9830 (12 Fed. Reg. 1259), issued February 24, 1947, and printed in pertinent parts in Appendix C attached hereto.

(2) Treasury Department Personnel Circular No. 165, dated March 27, 1952, and printed in Appendix D attached hereto.

(3) RC-ATC Memorandum No. 54-29, Adm. No. 16, issued by the Regional Commissioner, Atlanta, Georgia, Internal Revenue Service, Department of Treasury, dated November 22, 1954, and printed in Appendix E attached hereto.

(4) Federal Personnel Manual, Chapter E2, TS 286, January 17, 1950, and printed in pertinent parts as Appendix F attached hereto.

Statement of the Case

1. *Proceedings Below.* The case comes to this Court from the affirmance by the Court of Appeals for the District of Columbia Circuit of the trial court's judgment granting respondents' motion for summary judgment, denying petitioner's cross motion for summary judgment, and dismissing the complaint. No testimony was introduced by either side in the trial court. The statement of the case which follows is based upon the facts pleaded in the complaint (R. 1-6), and admitted in the answer (R. 7-8), and on those contained in the affidavits and annexes attached thereto, which were submitted in support of the respective cross motions for summary judgment (R. 11-31, 35-39).

2. *Petitioner's Government Service.* At the time of his discharge, petitioner was a non-veteran employee in the classified Civil Service of the Government of the United States (R. 2). Prior to his removal from Government service, petitioner had been a Federal employee for over 20 years (R. 2). Up to the time of his discharge from Federal service in 1955, petitioner's performance ratings had always been satisfactory, or better (R. 2). At the time of his removal from Federal employment, petitioner was serving as an Internal Revenue Agent, Internal Revenue Service (hereinafter sometimes referred to as IRS), U. S. Treasury Department, Jacksonville, Florida. Petitioner's grade, at the time of his discharge, was GS-11; his salary was $6,340.00 per annum (R. 2).

3. *Charges Against Petitioner and Proceedings Thereon.* By letter dated March 23, 1955, petitioner was served with charges preferred by the District Director (R. 11). In summary, the letter charges alleged that: petitioner (1) had prepared and filed false tax returns for the years 1948, 1949 and 1950, in claiming his 67 year old widower father

as a dependent in those years; (2) had filed false reports of official duties performed on five occasions; and (3) had insulted a taxpayer during the course of a conference (R. 11-12). The letter of charges advised the petitioner that he would be removed from Federal service if the allegations made against him were established (R. 11).

Petitioner answered the charges preferred against him by a comprehensive affidavit, with supporting affidavits attached, on March 30, 1955. Issues of fact were presented as to each charge and specification (R. 13). No hearing on the charges preferred and the petitioner's reply to them was provided. On April 13, 1955, the District Director notified the petitioner that he would be removed from his position as of April 29, 1955 (R. 18). The letter of notification advised that of the original three charges made against petitioner, the second of which contained five separate specifications, petitioner was absolved of four of the five specifications of the second charge (allegedly falsely reporting official duties performed), but that the other charges against him had been sustained (R. 18). The letter gave no explanation of the decision but merely repeated the charges (R. 18-21).[1]

4. *The Appeal Proceedings.* The District Director's notice of adverse decision also advised petitioner that he could (1) request the Civil Service Commission to investi-

[1] Petitioner, in his original answer to the charges, and thereafter, has claimed that he had listed his widowed father, who lived in Pittsburgh, Pennsylvania, and not in Florida, as a dependent under the erroneous belief that his father had retired and was not working (R. 13). No penalties were recommended or assessed against the petitioner in 1952, when he paid the deficiencies on his tax returns for 1948-50 (R. 13). The surviving specification of the second charge was decided on inconclusive inferences as to the location of petitioner's activities on a single day eight months before (R. 12, 15-16). Petitioner's version of a verbal dispute during a conference with a taxpayer, who may or may not have been the person who made the anonymous complaint which formed the basis of the third charge against him, is found in the record (R. 16-17).

gate, and (2) that he had a "right to appeal [the] decision under the grievance procedure of the Treasury Department" (R. 21). Petitioner pursued both avenues. His attempted appeal to the Civil Service Commission was denied by that Commission, and is not now in issue.[2]

Petitioner's appeal, pursuant to the grievance procedure of the Treasury Department first was denied by the Regional Commissioner, IRS, Atlanta, Georgia, by letter dated August 3, 1955 (R. 26). His action followed what he described as "the presentation made by you and your attorney during the hearing conducted in this office on July 27, 1955." (R. 26). This seems to have been the same meeting which had earlier been scheduled under the description of a "personal discussion" (R. 25).

Petitioner's appeal was next rejected by the Acting Commissioner of Internal Revenue, in a letter dated October 5, 1955, which also advised that petitioner could take further appeal, under the Department's grievance procedure, to the Director of Personnel (R. 27).

Section 4 of the grievance procedure of the Treasury Department provided (App. D, *infra*, pp. 22-23):

> "(c) If the employee is not satisfied with the finding of the head of the bureau or office, he may present the grievance in writing to the Director of Personnel, Treasury Department, for consideration and adjustment. The person against whom the grievance is directed shall be given an opportunity to make written answer to the grievance. The Director of Personnel shall endeavor to adjust the complaint by informal action.

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[2] The issue of the legality of the Civil Service Commission's denial of petitioner's appeal was raised and resolved against him in both the District Court and the Court of Appeals (R. 30, 41). That issue is not presented to this Court.

"(d) If such efforts to settle the grievance fail and the employee requests a hearing, a committee of three may be formed to hear and consider the grievance and make a recommendation. A committee will not be formed to hear trivial complaints.

"(1) The committee will be composed as follows: The aggrieved employee will name a person of his choice to be a member of the committee; The Director of Personnel will name the second member; and the two members thus chosen will agree upon a third member who will act as chairman. If the first two members are unable to agree upon a third within a week, the Administrative Assistant Secretary will appoint a third member who shall not be an employee of the bureau involved. All three members of the committee must be employees of the Treasury Department.

"(2) The committee shall hear orally the employee presenting the grievance, as well as the person or persons against whom the grievance is made.

"(3) The committee after considering all the evidence produced at the hearing will make its report and recommendation in writing to the Director of Personnel for review, approval, or comments if not approved, and transmittal to the Office of the Administrative Assistant Secretary for final Departmental action."

Petitioner appealed to the Director of Personnel of the Treasury Department on October 14, 1955, requesting an oral hearing, and the Director denied such a hearing by letter of October 24, 1955 (R. 36). On December 13, 1955, the Director denied petitioner's appeal (R. 36). He further advised petitioner by letter of January 12, 1956, that:

". . . it is not the policy of the Department to hold hearings on appeals in dismissal actions . . . In so far as appeals to the Treasury Department are concerned, there is no provision requiring an oral hearing, and therefore nothing was denied you . . ." (R. 28.)

Reasons for Granting the Writ

A. The Court of Appeals has held that petitioner was not denied any procedural rights in the removal proceeding pursuant to which he was discharged from the Treasury Department (R. 41). That ruling is in conflict with controlling decisions of this Court, which have held that procedural regulations validly prescribed by a Government administrator are binding on the administrator as well as the citizen, even where the administrative action under review is purely discretionary in nature. *Accardi* v. *Shaughnessy*, 347 U. S. 260; *Service* v. *Dulles*, 354 U. S. 363; *Watson* v. *United States*, 355 U. S. 14, *Vitarelli v. Seaton*, No. 101, 1958 Term.

B. Apart from the conflict between the decision below and previous decisions of this Court, the issue raised in this case presents an important question of Federal administrative law affecting the employment and removal rights of non-veteran Civil Service career employees in the Government of the United States. Unless reversed or clarified by this Court, the decision of the Court of Appeals for the District of Columbia in this case will furnish the controlling construction to be observed in the interpretation of similar regulations prescribing the grievance procedures to be applied to career employees in the Federal service.

We state these reasons in detail below.

A. *The Secretary Failed to Comply with his own Regulations*

This Court has firmly established the principle that if a Government official or agency lawfully prescribes rules of procedure, these are binding on the Government as well as the citizens. *Accardi* v. *Shaughnessy*, 347 U. S. 260, 267; *Bridges* v. *Wixon*, 326 U. S. 135, 153; *Chapman* v. *Sheridan-Wyoming Co.*, 338 U. S. 621; *Bilokumsky* v. *Tod*, 263 U. S. 149, 155. The rule applies even where the administrative action under review is discretionary in nature. *Accardi* v. *Shaughnessy*, *supra*. In *Service* v. *Dulles*, 354 U. S. 363, it was held that, even though the Secretary of State had absolute discretion to remove an employee of the Foreign Service "whenever he shall deem such termination necessary or advisable in the interest of the United States," the Secretary's action could not stand when he departed from his own procedural regulations in removing a Foreign Service officer. The same rule was applied in *Vitarelli* v. *Seaton*, No. 101, 1958 Term, even when a discretionary power of removal was used in an effort to validate a removal defective under the Department regulations. See also, *Watson* v. *United States*, 355 U. S. 14, where, in a *per curiam* decision reversing the Court of Claims in an action brought for back pay, this Court applied again the rule that a Government administrator is bound by his own procedural regulations. The principle of these cases controls the instant case. Indeed, it can be argued that it should hold with special force in this instance. The petitioner is a member of the classified Civil Service system. In *Service*, the employee was a Foreign Service officer and not in the classified system; in *Vitarelli* he was a "Schedule A" employee subject to summary discharge; and in *Watson* the petitioner was a probationary employee.

There is no argument here that the Secretary of Treasury lacked the discretionary, substantive authority to remove the petitioner. Petitioner is a non-veteran Civil Service employee. The only procedural requirements imposed by statute which the Secretary of Treasury was obliged to follow in removing petitioner on the basis of charges preferred against him are found in 5 U. S. C. 652(a). These, the Secretary largely observed. The petitioner was given notice in writing of the charges against him, and was permitted an opportunity for filing a written answer to the charges and for furnishing an affidavit in support of his answer. Following consideration of petitioner's answer, he was furnished with a written decision, although, it is true, an unexplained decision.

The petitioner did not have veteran's status. If he had, he would have had a statutory right to an appeal to the Civil Service Commission from any decision sustaining the charges brought against him, by virtue of Section 14 of the Veterans Preference Act of 1944. 58 Stat. 390; 5 U.S.C. 863. Lacking such status, however, petitioner could not claim either a statutory right of appeal, or the right to the hearing expressly granted Civil Service employees with veteran's preference through applicable regulations of the Civil Service Commission.[3]

If, however, the statutes are silent, the administrative regulations are not, and undertake to offer adequate procedural protection during the course of the proceedings for involuntary removal from Government employment. These are found in the Treasury Department grievance proce-

[3] Regulations of the Civil Service Commission give the Federal employee having veterans preference the "right to a hearing" before the office of the Commission taking initial adjudication of his case." 5 C.F.R. 22.402 (1958 Cum. Supp.). This right was spelled out in amendment to the Civil Service Regulations published in 20 Fed. Reg. 2699, April 23, 1955.

dure (App. D), and were not provided petitioner in this case.

The grievance procedure of the Department of Treasury was clearly within the authority of the Secretary of Treasury to promulgate. Sec. 01.2(d) of Executive Order No. 9830 (App. C) provides that:

> "The [Civil Service] Commission shall prescribe procedures to be followed by agencies in connection with removals, demotions and suspensions in the competitive service which will insure equitable and uniform treatment of employees against whom an adverse action is proposed."

Pursuant to the delegation of authority vested in it by Executive Order No. 9830, the Civil Service Commission has issued detailed standards and instructions to guide Federal agencies in adopting grievance procedures (App. F). Among the standards which the Commission applies in determining whether or not to approve a proposed grievance procedure of a particular Federal administrative agency is paragraph 6 of Chapter E2 (App. F):

> "Before the head of an agency makes a final decision, the employee should have an opportunity to present the matter to either a permanent or an ad hoc committee or board, whose recommendations should be advisory and designed to guide the head of the agency in reaching a decision. Membership on the committee should be limited to employees of the particular agency."

As previously noted, *supra*, p. 6, the grievance procedure issued by the Treasury Department made specific provision that where "the employee requests a hearing, a committee of three may be formed to hear and consider the

grievance and make a recommendation. A committee will not be formed to hear trivial complaints." (App. D.)

These regulations have been violated, unless the bare word "may" gives the Secretary a wholly discretionary power to form the grievance committee and grant the hearing, or, if he chooses, to deny this protection altogether. Usually, of course, when the word "may" appears in a statute, regulation or other legal document, it is to be given its ordinary grammatical meaning, connoting permission or power to take action. *Terre Haute & Ind. R. Co.* v. *Indiana*, 194 U. S. 579. However, the cases are frequent in which it has been held or recognized that the word "may," occurring in a statute, regulation or other legal instrument, is to be construed as "shall" or "must," and thus be given a mandatory meaning, when the context of the subject matter in which the word occurs compels that construction. *Supervisors* v. *United States*, 71 U. S. 435; *Bank of U. S.* v. *Dandridge*, 25 U. S. 63; *Farmers & M. Bank* v. *Federal Reserve Board*, 262 U. S. 649, 662; *U. S.* v. *Lexington Mills & E. Co.*, 232 U. S. 399. The dictionaries have recognized this alternative but equally acceptable construction of the word "may." For instance:

> "Where the sense, purpose or policy of a statute [or regulation] requires it, *may* as used in the statute [or regulation] will be considered as *must* or *shall* . . .". Webster's New International Dictionary, 2nd Unabr. Ed., 1957, p. 1517. (Italics supplied)

There cannot be much doubt of the meaning of the word "may," as it appears in Section 4(d) of Personnel Circular No. 165 (App. D). In the first place, Section 4(d), by its own terms, provides that a grievance committee "will not be formed to hear trivial complaints." Clearly, the opportunity of a hearing before a grievance committee is not

denied to the serious cases. Respondents will hardly argue that the involuntary dismissal of a Federal employee, a member of the classified Civil Service, with over 20 years of Government employment, did not present a serious matter for purposes of the application of Section 4(d).

However, if doubt remained, the Treasury Department has itself dispelled it. In Treasury Department Memorandum No. 54-29, Adm. No. 16, issued by the Regional Commissioner, and dated November 22, 1954 (App. E), it is expressly provided that the grievance procedure regulations, including the provisions of Section 4(d), are to be applicable in the case of the attempted removal of a non-veteran employee. That memorandum states:

> "The grievance procedure may also be used to appeal formal adverse personnel actions for which no specific appeal procedure is available. *For example, the grievance procedure may be used by a non-veteran to appeal his removal*, but it may not be used to appeal the removal of a veteran who submits an appeal to the Civil Service Commission under the procedure provided for veterans by Section 14 of the Veterans' Preference Act." (Italics supplied.)[4]

Too plainly for argument, if the removed employee "may" use the grievance procedure, the Department may not deny it to him.

Finally, the Federal Personnel Manual, Chapter E2 (App. F) provides, in subparagraph (6) thereof, that the heads of Federal Administrative agencies, before making a final decision upon a grievance presented to them, "should" provide the employee concerned with "an op-

[4] Subsequently, the expressed limitation on the right of a veteran who had initiated an appeal under the Veterans' Preference Act to utilize the grievance procedure was deleted. DIR-JAX-Memorandum No. 54-29, Adm. No. 16, Supp. No. 1, December 15, 1954.

portunity to present the matter to a permanent or an *ad hoc* committee or board, whose recommendations should be advisory and designed to guide the head of the agency in reaching a decision." (App. F.) It is true that the provisions of the Federal Personnel Manual are not regulatory, but merely intended to provide standards of Federal personnel management. Nevertheless, the provisions of Chapter E2 of the Manual are to be applied "in determining whether or not to approve a proposed grievance procedure." (App. F.) The Treasury Department's grievance procedure was approved by the Commission, and as expressly noted therein, was issued under the authority of Chapter E2, Federal Personnel Manual (App. D). Therefore, if the word "may," as it appears in Section 4(d) of the Treasury Department grievance procedure, were intended by that Department to carry a permissive meaning only, then to that extent Section 4(d) would not square with the standards of Chapter E of the Federal Personnel Manual, and could not have been approved by the Commission.

The opportunity for a hearing before a grievance committee, which Section 4(d) of the Treasury Department's grievance procedures gives the non-veteran employee who contests his attempted removal from his Federal employment, is thus not a right to be granted or withheld by the Secretary of the Treasury as he sees fit. The language of Section 4(d) itself, which specifically excludes the right to a hearing before a committee where the complaint is a trivial one, the standards issued by the Civil Service Commission as a condition of its approval of the adoption of grievance procedures by Federal administrative agencies, and the spirit and general purposes of the Treasury Department's grievance procedure, like those of other Federal agencies, combine to call for a construction of Section 4(d) which requires that the Secretary of Treasury afford a hearing

before a grievance committee in all cases of involuntary removal or discharge of a non-veteran employe. If we are correct in that analysis, then it follows that the decision of the Court of Appeals in this case conflicts with the results reached and the rule enunciated by this Court in *Accardi* v. *Shaughnessy*, 347 U. S. 260, *Service* v. *Dulles*, 354 U. S. 363, and *Vitarelli* v. *Seaton*, No. 101, 1958 Term.[5]

B. *An Authoritative Construction of the Grievance Procedure By This Court is Required*

A grievance procedure of the Department of Treasury affords the only opportunity "to appeal formal adverse personnel actions for which no specific appeal procedure is available" (App. E). The Treasury Department employee who does not enjoy veteran's status finds in Section 4(d) of the grievance procedure of that Department his only opportunity for a hearing before a tribunal whose independence and objectivity of judgment is at least partially assured by the fact that the employee is entitled to select one representative thereon (App. C). Yet if Section 4(d) of the Treasury Department's grievance procedure means no more than that the Secretary of Treasury may grant or deny a hearing before a grievance committee as he sees fit, even where the issue is whether the employee should be discharged, an important procedural protection and the only opportunity of the non-veteran employee for a hearing before an objective tribunal in protesting his removal from service can, as here, be denied him.

A considerable number of Executive Departments and

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[5] The Court of Appeals for the District of Columbia Circuit in another case followed *Accardi* v. *Shaughnessy* and *Service* v. *Dulles*, *supra*, in holding that the Federal administrator who promulgates procedural rules to be followed in exercising discretion otherwise vested in him by statute must comply with his own rules. *Coleman* v. *Brucker*, 257 F. 2d 661, 662 (C.A. D.C. 1958).

Federal administrative agencies, acting under the general standards set up by the Civil Service Commission, and with its approval, have adopted grievance procedures broadly similar in purpose and content to those prescribed by the Treasury Department. Attached hereto as Appendix G to this petition is a limited sampling, set out in pertinent parts, of grievance procedures that have been promulgated by several Federal administrative agencies. Those noted make provision at some stage in the grievance procedure for a hearing before a grievance committee prior to any final decision by the head of the agency. If the decision of the Court of Appeals sustaining the narrow construction which the Department of Treasury has given Section 4(d) of its grievance procedure in this case is permitted to stand, it will, in normal course, become the final word on the construction of similar grievance procedures throughout the Federal government. The heads of Federal departments, and of most administrative agencies, reside within the District of Columbia. A civil action wherein jurisdiction is not founded solely on diversity of citizenship "may be brought only in the judicial district where all the defendants reside . . ." 28 U.S.C. 1391(b). *W. H. Goff Co.* v. *Lamborn Co.*, 281 F. 613, 616 (C.C.A. 5, 1922), cert. den. 260 U.S. 734. There is little likelihood, therefore, that the issue decided by the Court of Appeals in this case can be raised in the future in any other circuit. The question of whether the Treasury Department's grievance procedure was intended to guarantee an opportunity of a hearing before a grievance committee to a non-veteran Federal employee before his involuntary discharge from the classified Civil Service was finally effected, should be passed upon by this Court in this case, since it must be settled in this case, if at all. *Muncie Gear Co.* v. *Outboard Co.*, 315 U. S. 759, 655; *Exhibit Supply Co.* v. *Ace Corp.*, 315 U. S. 126, 128; *Schriber Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50.

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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JUNE 12, 1959.

APPENDIX A

PER CURIAM: This case is before the court on appeal from a judgment of the District Court granting appellees' (defendants') motion for summary judgment, denying that of appellant (plaintiff), and dismissing the complaint.

The suit was filed to obtain a judgment against the Secretary of the Treasury, the Commissioner of Internal Revenue, and the members of the Civil Service Commission, decreeing and directing, among other things, that appellant be restored to the position in the Internal Revenue Service from which it was claimed he was unlawfully removed.

Essentially, appellant claims that the Civil Service Commission was arbitrary and capricious in refusing to accept appellant's appeal on the ground that it was filed too late, and that the Treasury Department violated pertinent laws, rules and regulations when it arbitrarily and capriciously denied appellant's procedural rights.

We have examined the record of the proceedings and have reached the conclusion that the Civil Service Commission, under the circumstances of this case, properly refused to accept appellant's appeal, and that he was not denied any procedural rights in the removal proceeding in the Treasury Department.

It follows that the judgment of the District Court must be and is

AFFIRMED.

APPENDIX B

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1958.

No.

JOHN A. MAYS, PETITIONER,

v.

ANDERSON, SECRETARY OF TREASURY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 13, 1959.

(s) EARL WARREN,
Chief Justice of the United States.

Dated this 5th day of May, 1959.

APPENDIX C

Executive Order 9830

Amending the Civil Service Rules and Providing for Federal Personnel Administration

By virtue of the authority vested in me by the Constitution, by section 1753 of the Revised Statutes (5 U. S. C. 631), by the Civil Service Act of January 16, 1883 (22 Stat. 403), and as President of the United States, it is hereby ordered as follows, effective May 1, 1947:

PART I

ORGANIZATION FOR PERSONNEL ADMINISTRATION

Organization for personnel administration in the executive branch of the Federal Government is hereby prescribed as follows:

SEC. 01.1. Responsibility for personnel management. Personnel management is a primary responsibility of all who plan, direct, or supervise the work of Federal employees. Personnel management methods should be consistent for the Government as a single employer and yet be sufficiently flexible to meet the diversified conditions in the Federal service.

SEC. 01.2. Civil Service Commission responsibilities under this order. (a) The Commission shall be responsible to the President for the proper application of the Civil Service Act and Rules, the Veterans' Preference Act, and all other applicable statutes and Executive orders imposing responsibilities on the Commission.

(b) The Commission shall exercise and provide leadership in personnel matters throughout the Federal service, and in the discharge of this responsibility shall, whenever practicable, consult Federal agencies.

(c) The Commission shall develop and promulgate standards, applicable to the competitive service and designed to protect and promote its efficiency, for the reinstatement or reemployment of former Federal employees, and for the

promotion, demotion, reassignment, and transfer of present employees. The Commission shall also determine the applicability, in general and in specific cases, of the reemployment provisions of (1) section 8 of the Selective Training and Service Act of 1940 (54 Stat. 890) as amended (50 U. S. C. App. 308), to persons who left the Federal service to serve in the armed forces of the United States, and (2) section 2 of the act of June 23, 1943, 57 Stat. 162, as amended (50 U. S. C. App. 1472), to persons who left the Federal service to serve in the merchant marine; and the Commission may issue such regulations or instructions as it may deem necessary or appropriate for carrying out the said reemployment provisions.

(d) The Commission shall prescribe procedures to be followed by agencies in connection with removals, demotions, and suspensions in the competitive service which will insure equitable and uniform treatment to employees against whom adverse action is proposed.

(e) The Commission shall, when consistent with law and with the economical and efficient administration of the Government, delegate to the agencies its authority to act in personnel matters in accordance with standards issued by the Commission.

(f) The Commission shall maintain an adequate system of inspection to determine that equitable and sound application of statutes, Executive orders, regulations and standards relating to personnel management is being carried out by the agencies. Whenever the inspection indicates failure on the part of an agency to adhere to established policies, regulations and standards, the Commission shall take such action as may be appropriate to bring about adherence thereto. In this connection, the Commission may suspend or revoke any delegation of its authority.

APPENDIX D

Attachment to DIR-Jax-Memorandum
No. 54-29, Adm. No. 16

U. S. TREASURY DEPARTMENT

Office of the Commissioner of Internal Revenue
Washington 25, D. C.

P-Circular Letter

May 5, 1952

Policy and Procedure for Handling Employee Grievances

OFFICERS AND EMPLOYEES OF THE BUREAU OF INTERNAL REVENUE CONCERNED:

There is quoted below for your information and guidance Personnel Circular No. 165, dated March 27, 1952, approved by Mr. William W. Parsons, Administrative Assistant Secretary of the Treasury, which sets forth the Department's policy and the established procedure for handling employee grievances.

1. *Purpose:*

It has been noted from Civil Service inspection reports that the Treasury Department's Grievance Procedure, issued December 8, 1942, has not been properly distributed, circularized or otherwise called to the attention of all employees. The Grievance Procedure is, therefore, being reissued as a Personnel Circular, with a view to obtaining complete dissemination among Treasury employees.

2. *Authority:*

Chapter E2, Federal Personnel Manual.

3. *Policy:*

(a) The Treasury Department maintains an open policy with reference to the settlement of grievances, and, although it is believed the great majority of complaints

can and should be settled at their source every employee has the right of appeal, either orally or in writing, to the Secretary of the Treasury, or to those in the Secretary's Office to whom he has delegated responsibility for such matters. In presenting complaints or grievances in accordance with the procedure hereinafter provided, employees shall be free from any restraint, interference, coercion, discrimination or reprisal. The employee shall have the right to designate, if he so desires, a representative or representatives of his own choosing to present his grievance to the supervisor, Director of Personnel, or to any other person or committee designated to consider his appeal.

(b) The procedures set forth herein shall not be available in those types of cases in which specific appeals procedures have been provided by Civil Service regulations.

4. *Procedure:*

In order to provide for the handling of grievances in an orderly manner, the following procedures are established:

(a) Supervisors should hear promptly and courteously the complaints of employees under their supervision, should attempt to clarify any misunderstandings, and should make any reasonable adjustments that appear to be desirable or necessary. If there are policies involved which, in the supervisor's opinion, are operating inequitably, he should so advise his own supervisory officer with his recommendations for changes.

(b) If the employee is not satisfied with the action of the supervisor, he may present his case, either orally or in writing, to the next official in line or to the head of the bureau or office.

(c) If the employee is not satisfied with the finding of the head of the bureau or office, he may present the grievance in writing to the Director of Personnel, Treasury Department, for consideration and adjustment. The person against whom the grievance is directed shall be given an opportunity to make written answer to the

grievance. The Director of Personnel shall endeavor to adjust the complaint by informal action.

(d) If such efforts to settle the grievance fail and the employee requests a hearing, a committee of three may be formed to hear and consider the grievance and make a recommendation. A committee will not be formed to hear trivial complaints.

(1) The committee will be composed as follows: The aggrieved employee will name a person of his choice to be a member of the committee; The Director of Personnel will name the second member; and the two members thus chosen will agree upon a third member who will act as chairman. If the first two members are unable to agree upon a third within a week, the Administrative Assistant Secretary will appoint a third member who shall not be an employee of the bureau involved. All three members of the committee must be employees of the Treasury Department.

(2) The committee shall hear orally the employee presenting the grievance, as well as the person or persons against whom the grievance is made.

(3) The committee after considering all of the evidence produced at the hearing will make its report and recommendation in writing to the Director of Personnel for review, approval, or comments if not approved, the transmittal to the Office of the Administrative Assistant Secretary for final Departmental action.

5. *Distribution:*

The contents of this circular will be made known to all employees by posting on bulletin boards, circularizing or other methods.

An ample initial supply of this circular letter is being furnished in order that it may be adequately distributed among all employees. In addition, it is desired that it be kept posted on all bulletin boards.

A copy of this P-Circular Letter should be incorporated in all Personnel Procedure Manuals under General Information, Pages 25-24 and 25-25.

(Signed) JOHN M. DUNLAP,
Commissioner.

APPENDIX E

U. S. TREASURY DEPARTMENT

Internal Revenue Service
Office of the District Director
Jacksonville, Florida

November 22, 1954.

DIR-Jax-Memorandum No. 54-29 Adm. No. 16

Policy and Procedure for Handling Employee Grievances

Section 1. Purpose

.01 The purpose of this memorandum is to call the attention of all employees in the Jacksonville District to the Treasury Department Grievance Procedure described in P-Circular Letter dated May 5, 1952, which quoted Treasury Department Circular No. 165, which is attached. In view of the changes in supervisory levels since the Reorganization, it appears desirable also to explain to employees the channels through which grievance appeals should be forwarded within the Internal Revenue Service.

Section 2. Authority

.01 Treasury Department Circular No. 165, dated March 27, 1952; Internal Revenue P-Circular Letter dated May 5, 1952; Memorandum of October 27, 1953 from the Assistant Commissioner-Administration; RC-ATL-Memorandum No. 54-62, dated September 13, 1954; and Chapter E-2 of the Federal Personnel Manual.

Section 3. Scope

.01 The provisions of this memorandum apply to all employees of the Jacksonville District.

.02 The term grievance as used in this memorandum means primarily an employee's expressed feeling of dissatisfaction with aspects of his working conditions and relationships which are outside his control. In every organization no matter how well administered there are from

time to time frictions, sometimes between employees and supervisors, sometimes between employees, and sometimes occasioned by physical working conditions or agency practices. The grievance procedure is a method of determining the specific causes of any such frictions or grievances and finding the best way to remove them before they reach serious proportions. The grievance procedure may also be used to appeal formal adverse personnel actions for which no specific appeal procedure is available. For example, the grievance procedure may be used by a nonveteran to appeal his removal, but it may not be used to appeal the removal of a veteran who submits an appeal to the Civil Service Commission under the procedure provided for veterans by Section 14 of the Veterans' Preference Act. The grievance procedure is not used for appeals of reduction in force, classification actions, or performance ratings or for appeals dealing with discrimination because of race, color, religion, or national origin, because specific appeal procedures are provided for these matters. (Procedures for the appeal of performance ratings and classification actions are described in DIR-Jax-Memorandum No. 54-30, dated November 23, 1954. Procedures governing Fair Employment Practices are outlined in Treasury Department Personnel Circular No. 136, 3rd Revision.)

Section 4. Procedure

.01 The Treasury Department policy as stated in the attachment is based on a belief that the great majority of complaints can and should be settled at their source, but that every employee has the right of appeal, either orally or in writing, to the Secretary of the Treasury or those acting for him. In order that grievances may be handled in an orderly manner, the Treasury Department has prescribed procedures to be followed in their presentation, which are outlined below as they are to be applied within the Internal Revenue Service in this District:

1. An employee who has a grievance should discuss it first with his immediate supervisor. Most grievances should be settled informally at this stage. Supervisors

should hear promptly and courteously complaints of employees under their supervision, should attempt to clarify any misunderstandings, and should make any reasonable adjustments that appear to be desirable or necessary which are within their authority. Where the supervisor is unable to make changes which he considers advisable, he should make recommendations through his own supervisor.

2. If an employee of this office is not satisfied with the action of his supervisor, he should present his case to the next official in line or to his Division Chief. Any official to whom a grievance is presented should give the employee a decision as soon as possible. It is usually preferable that an employee submit his case in writing.

3. An employee's grievance, if presented in writing, must receive a written reply. Any supervisor above the level of the employee's immediate supervisor who receives a grievance appeal must make at least an informal written record of his action.

.02 An employee of this District who is not satisfied with the decision of supervisory officials at the lower levels may present his grievance to the District Director. The District Director, after considering the case, and after any investigation or hearing which he considers appropriate, will notify the employee in writing of his decision.

.03 An employee who is not satisfied with the decision of the District Director with regard to a grievance may present his case, preferably in writing, to the Regional Commissioner, who will arrange for such inquiry into the case or informal hearing as may be appropriate, and will render his decision promptly in writing.

An appeal under the grievance procedure of an adverse personnel action, such as removal, suspension, or change to lower grade for administrative reasons other than classification action, which is taken under the delegated personnel authority of a District Director should be addressed to the Regional Commissioner, who will forward the appeal with his recommendation to the Commissioner, attention:

Director, Personnel and Training Division, for decision. If the employee is not satisfied with the decision made by the Commissioner, he may present his case in writing through the Commissioner to the Director of Personnel, Treasury Department, for further consideration. This right of appeal is available to all employees, and is in addition to any right of appeal that such employees may have to the Civil Service Commission. An advance personnel action (such as a removal) of which an employee must be given advance notice, an opportunity to reply, and then a final notice of the District Director's decision should not be appealed under the grievance procedure until the employee has received the final notice from the District Director.

.04 An employee who is not satisfied with the decision of the Regional Commissioner on a grievance should request the Regional Commissioner to forward his appeal to the Commissioner. The Regional Commissioner will forward such cases with his recommendation to the Commissioner, attention: Personnel and Training Division, for a decision.

.05 An employee who is not satisfied with the decision made by the Commissioner of Internal Revenue on a grievance may present his case in writing through the Commissioner to the Director of Personnel, Treasury Department, for further consideration as provided in paragraph 4(c) and (d) quoted in the attachment.

.06 It is particularly important that grievances be presented through normal supervisory channels in order that problems may be resolved with a minimum of delay at the lowest possible level. However, if an employee believes he has valid reasons for not following the procedures outlined above, he may refer his complaint directly to the District Director or to the Chief of the Personnel Branch, who will investigate the matter and assist all concerned in effecting a satisfactory conclusion.

Section 5. Referral to Inspection Service

.01 If a grievance involves allegations of misconduct or irregularities on the part of any employee or supervisor, over which the Inspection Service has investigative responsibility as set forth in IR-Mimeograph No. 54-134,

dated July 23, 1954, the case will be referred to the Office of the Regional Inspector promptly as provided in those instructions and in RC-Atl-Memorandum No. 54. Decisions may be delayed in such cases until completion of any necessary investigation by the Office of the Regional Inspector.

Section 6. Distribution

.01 This memorandum and the attachment, which quotes the Treasury Department Grievance Procedure, are being distributed to all employees. In addition, they should be kept posted on all bulletin boards in the Jacksonville headquarters office and in the field offices.

Section 7. Effective Date

.01 The provisions of this memorandum are effective immediately.

LAURIE W. TOMLINSON,
District Director.

APPENDIX F

Chapter E2—Employee Relations

Grievance Procedures

Coverage and Definitions

This section deals with the establishment of procedures for handling grievances in Federal agencies.

Grievance as used in this section means an employee's expressed feeling of dissatisfaction with aspects of his working conditions and relationships which are outside his control.

Grievance procedure as used in this section means a method of determining the specific cause of the grievance and finding the best way to remove it.

Grievance procedures are intended for use when the dissatisfaction arises in the day-to-day working relationships between employee and employee or between employee and supervisor. If the cause of disasatisfaction is an official action of the agency or the Civil Service Commission, a formal appeal or request for review may be the proper course of action to take.

Regulatory Background

Executive Order No. 9830 is the source of authority for instructions relating to the establishment of grievance procedures in Federal agencies. The full text of Executive Order No. 9830 is printed in Chapter Z1, beginning on page Z1-203.

Required Action

The Director of Personnel shall establish grievance procedures. Before they are put into effect, he shall obtain the official approval of both the Civil Service Commission and the head of the agency. He shall send requests for Commission approval of proposed procedures, whether for use in Washington or elsewhere, to the Efficiency Ratings Administration Section of the Personnel Classification Division of the Commission.

Standards Applied in Commission's Review

The Commission will apply the following standards in determining whether or not to approve a proposed grievance procedure. Administrative procedures and details will, of course, differ from agency to agency, because of differencies in points of view or in prevailing conditions.

Adherence to the letter and spirit of these standards should produce a grievance procedure which will improve morale, working conditions, and efficiency.

(1) Both supervisors and employees should have an opportunity to take part in developing and formulating the procedure.

(2) The Director of Personnel or some other appropriate official reporting directly to the head of the agency should have full and definite responsibility for the administration of the procedure. He should maintain an open-door policy and permit employees to consult with him freely and informally. Before making any recommendations he should consult with appropriate supervisors.

(3) There should be a simple orderly method whereby the employee may present his grievance within the agency to his own supervisor and to those higher in the supervisory and administrative line. The employee should have the assurance that if satisfactory settlement is not made at a lower level, he may carry the matter to the head of the agency for review and final decision.

(4) The procedure should recognize the operating administrative responsibility of supervisors at all levels to receive and act promptly and fairly upon the grievance of their subordinates, and should provide for the delegation of appropriate authority to carry out this responsibility.

(5) As soon as a grievance has been carried beyond the immediate supervisor, all facts relating to it should be presented in writing by the employee and by any individual against whom the grievance may be directed. The statements should indicate clearly who is aggrieved and the specific nature of the grievance. In such cases, provision should also be made for a written decision.

(6) Before the head of the agency makes a final decision,

the employee should have an opportunity to present the matter to either a permanent or an ad hoc committee or board, whose recommendations should be advisory and designed to guide the head of the agency in reaching a decision. Membership on the committee should be limited to employees of the particular agency.

(7) The employee should be assured of a reasonable amount of official time to prepare and present his grievance.

(8) In presenting a grievance, the employee should be unimpeded and assured freedom from restraint, interference, coercion, discrimination, or reprisal.

(9) The employee should have the right to designate a representative or representatives of his own choosing to present his grievance.

(10) The statement of procedure or some other official document of the agency must expressly recognize the right of employees to join or refrain from joining employee organizations or associations without interference, coercion, restraint, or fear of discrimination or reprisal, with the following exceptions:

(a) They may not have membership in organizations or associations which directly, or by affiliation with other organizations or associations, impose upon them an obligation or duty to engage in, or assist in, any strike against the United States.

(b) They shall not have membership in any political party or any organization which advocates the overthrow of our constitutional form of Government in the United States.

(11) Provision should be made for the duplication of a statement of the procedure and its distribution to all employees in such manner that all will be fully informed of their rights as to presentation of their grivances and the procedure through which these rights may be exercised.

APPENDIX G

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AFM 40-1
AF E2.2

Grievance Procedure for Air Force Civilian Personnel

1. General Provisions

A. Scope. Provisions of this section are applicable to all employees and to former employees who have been separated involuntarily from Air Force activities located within the 48 States and District of Columbia. These provisions also are applicable to all employees and former employees of activities located outside the 48 States and District of Columbia provided they are citizens of or owe allegiance to the United States. Regulations will be established for activities located outside the 48 States and District of Columbia to govern disposition of grievances of employees who are not United States citizens or who do not owe allegiance to the United States. These regulations will conform to provisions of this section insofar as is consistent with local law, prevailing customs and practices, existing treaties, or executive agreements. The final level of appeal for employees who are not citizens of, or do not owe allegiance to the United States will be the major air command concerned.

B. Legal Basis. Executive Order 9830 (reprinted in FPM Z1) is the basic authority for Civil Service Commission requirements relative to the establishment of grievance procedures in Federal agencies. (See Federal Personnel Manual, Chapter E2. The legal basis for the review of a performance rating is the Performance Rating Act of 1950, Public Law 873, 81st Congress, approved 30 September 1950 (reprinted in FPM Z1).

C. Applicability.

(1) All grievances will be resolved in accordance with instructions contained in this section, except those based upon the following:

(a) Reduction in force actions.
(b) Classification of positions.
(c) Separation and suspension actions for security reasons taken under Executive Order 10450 as amended by Executive Order 10491.
(d) Action taken by direction of the Civil Service Commission or other agencies authorized to direct actions.
(e) Warning notices advising employees 90 days in advance of a possible "Unsatisfactory" performance rating.
(f) Determinations of officially designated medical officers relative to the physical or mental ability of an employee to perform the assigned duties of a position.
(g) Personnel actions which have been appealed direct to the Civil Service Commission under provisions of section 14 of the Veterans' Preference Act of 1944 (see Part 22 of the Civil Service Regulations). Grievances submitted under the provisions of this section will not be entertained after an appeal of the same action has been initiated with the Civil Service Commission. Action being taken on an appeal submitted under the grievance procedure will cease concurrent with initiation of an appeal on the same subject to the Civil Service Commission.
(h) Separation (Disqualification), as defined in FPM R1, during the probationary or trial period.
(i) Terminations of persons serving in temporary appointments limited to one year or less.

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3. GRIEVANCE COMMITTEES.

a. Installations.

(1) A grievance committee will be appointed on an ad hoc basis by the commander of each installation maintaining a central civilian personnel office. Every effort will be made to select members who

will be impartial in weighing the facts and will use sound judgment in arriving at recommendations. The membership of this committee will be composed of Air Force personnel and will consist of four persons. At least two of the three voting members will be civilian employees of the installation. Whenever feasible, one of the civilian employee members will be of the same or similar working level as the aggrieved employee. When considering an appeal of a "Satisfactory" rating, a voting member of the installation incentive awards committee will be appointed to the ad hoc grievance committee. The fourth committee member will be a representative of the civilian personnel office serving as a nonvoting chairman. Full membership of the committee will be required to constitute a quorum.

(2) The committee is a fact-finding and advisory body. It has one primary purpose, which is to assist the commander in arriving at a prompt and fair decision by makng a full and complete evaluaton of the evidence in the case; by impartially appraising the evidence; and by reporting to the commander a record of the hearing proceedings, a statement of the committee's findings, and its recommendations.

(3) The chairman of the committee will (a) make certain that the hearing is scheduled promptly and conducted in an orderly and expeditious manner and that the regulations governing hearing procedure and order of business are observed; (b) be responsible for the maintenance of necessary records; and (c) assist the committee in making its recommendations to the commander.

b. Headquarters USAF ai 1 Office of the Secretary. The Secretary of the Air Staff will appoint a grievance committee on an ad hoc basis for hearing grievances emanating from employees in Headquarters USAF and the Office of the Secretary of the Air Force. The composition and functions of this committee will be the

same as those provided for the grievance committee at installations.

4. GRIEVANCE REVIEW COMMITTEES.

a. Major Air Commands.

(1) The commander of each major air command will appoint a permanent grievance review committee composed of personnel of the command headquarters. All committee members will be voting members. This committee will consist of three persons and at least one alternate for each regular member to serve in the absence of the member. The committee chairman and his alternate will be members of the staff civilian personnel office. The duties of the chairman will be similar to those of the nonvoting chairman of the ad hoc committee appointed at installations. At least two of the committee members will be civilian employees.

(2) Particular care will be given to the selection of committee members and alternates. They will be persons who are especially competent to analyze and weigh evidence from grievance records, and will be persons of demonstrated ability to make fair, impartial, and sound judgments in arriving at recommedations.

(3) The committee will serve in an advisory capacity to the commander. This committee is not a hearing body nor a committee of original jurisdiction. Its functions are to review the complete records of grievances including both the merits and procedural aspects of each appeal submitted. The committee's report to the commander will contain, as a minimum, the information specified in paragraphs 11c, d, and e.

(4) In addition to the ad hoc committee prescribed by paragraph 3, the commanders of one base commands, who also perform the functions of a base commander, will appoint permanent grievance review committees. The composition and func-

tions of this committee will be the same as those established for other major commands. When the recommendations of an ad hoc committee are unfavorable to an employee, the entire record will be referred to the permanent grievance review committee for an independent review and recommendations prior to forwarding to the commander for decision.

(5) At one base commands where there is an installation commander in addition to the major air commander the ad hoc committee's recommendations will be forwarded to the installation commander for decision. Upon receipt of an unfavorable decision, the employee may appeal further to the major air commander. In that event, the appeal will be reviewed by the permanent grievance review committee.

b. Headquarters USAF. The Chief of Staff, Headquarters USAF will appoint a permanent grievance review committee to review appeals from the decisions of the Secretary of the Air Staff, Headquarters USAF. The functions of this committee will be the same as those established for major air commands.

c. Secretary of the Air Force. A permanent grievance review committee, appointed by the Secretary of the Air Force, will review grievances wherein an employee appeals the decision of the major air command headquarters on the basis of violation of law, Executive order, rule or regulation of the Civil Service Commission, or regulation of the Air Force. This committee will act in a fact-finding and advisory capacity to the Secretary of the Air Force. Three members will constitute a quorum.

5. Administrative Principles and Requirements.

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b. Time Limit on Presenting Certain Grievances.

(1) An employee may present a grievance based on an adverse personnel action upon receipt of the notice

of administrative to effect the action or based on a performance rating upon receipt of the written notice of rating, but not later than 30 calendar days after the effective date of the action or date of receipt of notice of rating unless there are unusual circumstances which warrant consideration of the grievance subsequent to that date.

(2) A former employee who has been separated involuntarily, or his representative, may present his grievance in writing to the installation commander within 30 days following the effective date of the separation if the grievance is one to which the grievance procedure is applicable. An oversea employee to whom this paragraph is applicable and who has departed from the country in which he was formerly employed will be given a choice of an inquiry into the facts, or of a hearing, with travel and other expenses incident thereto to be borne by the employee. The procedure prescribed in paragraph 8 below will apply for considering and rendering a decision.

c. Prohibition Against Using Procedure to Delay Action. The grievance procedure will not be used as a device to delay administrative action. Appeal rights provided by the grievance procedure in cases of separation, suspension, or change to lower grade are available immediately upon receipt of the notice of decision, subject to the following conditions:

(1) The hearing or inquiry will be conducted as promptly as possible within the time limits specified in paragraph 8 below. However, except as provided in (2) below, in no case will the notice period be extended or the separation delayed because a grievance hearing or inquiry has not been scheduled or conducted.

(2) If an employee stationed at an activity located outside the 48 States and the District of Columbia, who currently is, or upon satisfactory completion of an agreed period of service would be, eligible

for return travel and transportation at Government expense to place of residence as established at time of appointment, submits an appeal within five working days after he receives a notice of final decision to separate him, separation action will not be taken until the installation commander has notified him of his decision relative to the appeal.

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6. ORAL PRESENTATION OF GRIEVANCE.

a. An employee who has a grievance should present it, in the first instance, orally to his immediate supervisor, stating his grievance fully and in detail with respect to time, place, dates, and other information pertinent to the grievance and indicating the remedy sought. The supervisor will consider it promptly and impartially, allowing the employee to state his grievance fully, will collect and evaluate all the essential facts, and will inform the employee promptly of his decision. If the employee is dissatisfied with the decision, he will be advised that he may discuss the problem with the next higher supervisor.

b. If the employee believes there are valid reasons why an initial presentation of his grievance to his immediate supervisor would be unsatisfactory, he or his representative may present the grievance in the first instance to the second supervisor. If an employee believes an interview with the second supervisor would be similarly unsatisfactory he may consult the civilian personnel officer. The civilian personnel officer, acting in a purely advisory capacity, will assist the employee in determining, on the basis of the facts in the particular grievance, the supervisory official to whom it is appropriate to present the grievance, and will advise the employee regarding any question connected with the presentation of the grievance in writing. Whenever possible, after the proper supervisory official is determined and the grievance is reduced to

writing, the civilian personnel officer will bring this official and the employee together so that they may discuss and possibly resolve the grievance informally.

7. WRITTEN PRESENTATION OF GRIEVANCE. If the employee or his representative wishes to present a grievance to the supervisor above the second supervisor, the grievance must be reduced to writing, including necessary details as indicated in paragraph 6 above. The employee also will indicate whether he wishes a hearing. The supervisor to whom the grievance is presented will initiate action within ten working days to obtain all the pertinent facts, give opportunity to persons complained against to make a written reply, render a decision, and notify the employee in writing of his decision and the reasons therefor. If the decision is not acceptable to the employee, he will be informed by the supervisor that he may present his grievance in writing through supervisory channels to the commander.

8. PRESENTATION TO THE COMMANDER. Upon receipt of a grievance, the commander will take action promptly to obtain the facts. As provided below, a hearing will be conducted or an inquiry into the facts will be made within ten working days of the date of receipt of the grievance, unless unusual circumstances cause a delay. In case of delay, the employee will be notified of the reasons for the delay and the reasons will be recorded.

a. If requested by the employee, the commander will give him, or his representative, an opportunity to present the matter to an impartial grievance committee prior to rendering a decision. If the employee's written presentation of his grievance is not explicit concerning his desire for a grievance hearing, oral clarification will be obtained and made a matter of record. When a request is not made, the commander, of his own volition, may establish a grievance committee to obtain the facts.

b. If no committee is convened in accordance with "a." above, the commander, prior to rendering a decision,

will instruct the civilian personnel officer to ascertain the facts and submit a summary together with findings and recommendations. The inquiry conducted by the civilian personnel officer will be informal and directed toward providing a basis for fair consideration of the grievance. The inquiry will include the examination of written or oral statements made by the employee or his representative, the supervisor, and their witnesses. Both the employee and the supervisor will be given the opportunity to comment on any statements made by the other during the course of the inquiry.

9. Preparation for Committee Hearings.

a. The chairman of the committee, upon receipt of a request for a hearing, will give all persons immediately concerned written notification of the hearing. These notices will be given sufficiently in advance to permit adequate preparation for the case and will:

(1) Indicate the date, time, and place of the hearing, and the nature of the grievance to be considered.

(2) Inform the complainant and the person(s) complained against of their right to request witnesses to appear in their behalf or to present signed statements from witnesses if witnesses are not available. This notification will state that persons desiring to bring witnesses will furnish the committee chairman with their names together with an indication of how the testimony of each would be relevant. The notification also will include the following information:

(a) The chairman will request, in writing, all witnesses who are Air Force employees to attend.

(b) The chairman cannot compel persons to testify.

(c) Only witnesses will be heard who, in the opinion of the committee, are in a position to offer testimony relevant to the grievance; whose presence is considered necessary to a fair

consideration of the grievance; and whose presence at the hearing is practical.

(3) Advise all persons concerned of their right to:

(a) Obtain and submit documentary evidence.
(b) Obtain advice from the civilian personnel office relative to the regulatory and procedural aspects of preparing the case.
(c) Have, or examine, a copy of the grievance procedure.

(4) Advise the complainant of his right to appear personally before the committee and to arrange for representation at the hearing.

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NATIONAL ADVISORY COMMITTEE FOR AERONAUTICS

NACA Administrative Supplement to Federal Personnel Manual

March 30, 1953.

Chapter E2—Employee Relations

(Supplement #2)

1. Administrative regulations and guidelines set forth below have been issued by the NACA to supplement basic material contained in Chapter E2 of the Federal Personnel Manual (FPM). A marginal note should be made under the appropriate chapter heading to indicate that supplementary material has been issued.

2. NACA Supplement #1 to Chapter E2 of the FPM is hereby superseded.

Basis—The following regulations are established pursuant to Executive Order 9830 (see page Z1-203 of the Federal Personnel Manual) and have been approved by the Civil Service Commission.

Coverage—The provisions of this regulation are applicable to all employees of the NACA.

Policy—The NACA will give fair and prompt consideration to employee problems or complaints at all supervisory levels, and to the filing of appeals in accordance with established regulations and procedures. The NACA also recognizes that employees have the right to join, or refrain from joining, any employee organization or association (except as prohibited by law).

Administrative Responsibilities—The NACA Executive Officer and the director at each NACA laboratory will exercise necessary supervision as will assure full execution of principles embodied herein.

Types of cases

a. *Cases covered by employee problem procedures*—These procedures are restricted to types of cases arising

during an employee's employment which cause discontent or dissatisfaction with his position, such as poor employee and supervisory relations, poor employee and employee relations, questionable disciplinary action, and other just or supposed grounds of complaint.

b. *Cases excluded from employee problem procedures*—The following types of cases will not be considered in this chapter, but must follow procedures designed exclusively for the type of case concerned: appeals from reductions of force, position classifications, official performance ratings, complaints of discrimination under the Fair Employment Program (E.O. 9980), subversive or political activity, and veterans appeals under the Veterans' Preference Act of 1944.

Processing of grievances

a. *General*—An employee has the right to consult freely with his immediate supervisor concerning any problem related to his duties, working conditions, employment status, tenure, promotion, furlough, or other matters related to his work. Such problems or complaints should be resolved promptly by the immediate supervisor, whenever possible. If the matter cannot be adjusted at this level, he has the right to have his problem considered on through succeeding supervisory levels up to and including the director of the laboratory concerned (NACA Executive Officer at NACA Headquarters).

b. *Right to representation*—An NACA employee has the right to designate a representative of his own choosing to present the employee's problem to supervisors at any level, to the personnel officer, or to any other designated person or committee.

c. *Formalizing problems*—An employee may reduce his problem to writing at any level beyond the immediate supervisor. All facts relating to the problem must be specific. Written decisions are required in such cases.

. . . . . .

G. *Appeals to NACA Executive Officer*—If an employee is not satisfied with a laboratory decision on a matter which has not been delegated to the director of the laboratory for final decision he may appeal in writing to the NACA Executive Officer.

(1) The appeal must be filed within 10 days (exclusive of any time the employee may be absent on leave or official business) of the date on which the employee received notice of the decision from the official in charge.

(2) Upon receipt of the notice of appeal, the Executive Officer will seek, by any and all means he deems necessary, to obtain a prompt and satisfactory adjustment. He may (a) decide the case on the basis of a thorough examination of the written reports and records, if he is satisfied with the sufficiency of the evidence presented, or (b) determine that a further investigation appears necessary.

(3) Before the NACA Executive Officer makes a final decision adverse to the employee's complaint, the employee should have an opportunity to present the matter to an ad hoc committee. Membership on the committee will be limited to NACA employees and their recommendations will be advisory and designed to guide the Executive Officer in reaching a decision.

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Correction of disciplinary action when complaint is upheld—When an employee's complaint in a disciplinary action is upheld, the action shown in the employee's personnel file will be canceled, except where a separation has been effected. For example:

a. *Letter of reprimand*—A letter canceling the letter of reprimand will be added to the personnel file.

b. *Suspension*—A canceling personnel action will be issued; and the time of the suspension will be charged to annual leave if available. Payment for the time charged to annual leave will be made. If annual leave is not available, the time will be charged to leave without pay.

Publication—These regulations may be made available to all employees.

DEPARTMENT OF STATE

PART V-A

OPERATIONS & ADMINISTRATION

512. *Adjustment of Complaints and Grievances*

512.1 Definitions of a Complaint and a Grievance

A complaint is an expression of reasonable dissatisfaction with conditions which are alleged to adversely affect the work or relationships of an employee. A grievance is a complaint not resolved by supervisors and which the employee believes merits the consideration of the Director.

512.2 Coverage

This procedure applies to all employees of the U. S. Information Agency, both domestic and overseas. It applies to all employee complaints except those for which separate appeal processes are specifically provided both within the Agency and through the Civil Service Commission. The invoking of this procedure will not be permitted to delay or interrupt the orderly completion of administrative processes already initiated, or to give an employee retention rights not provided by the nature of his appointment.

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512.4 Steps in the Resolution of Complaints and Grievances

To be given full consideration employee complaints must be presented in an orderly manner. The following three-step procedure has therefore been established for the discussion of conditions which adversely affect an employee's work:

a. *Step I—Informal discussion of complaints*—The employee will discuss his problem with his immediate supervisor and succeeding levels of au-

thority including the principal officer of the employee's organizational element. The sound application of good personnel principles by supervisors will resolve most problems at this informal stage. The employee and his supervisor, whether in the U. S. or overseas, will be free to obtain assistance and guidance from the Personnel Division at any time in finding a solution to his problem.

b. *Step II—Formal presentation of complaint—*

(1) In the event a complaint is not resolved through Step I, the employee may present his complaint in writing to the principal officer of the Agency domestic or overseas element, in which he works, with a copy to the Director of Personnel. This statement must be specific and clearly identify the condition or personalities involved in the circumstances appealed.

(2) The officer receiving the appeal will investigate the pertinent facts, establish the points at issue, and accord the complaint careful and impartial consideration.

(3) Within ten days of the receipt of the complaint one of the following actions will be taken by the officer receiving the appeal:

(a) The officer will negotiate an equitable solution agreeable to the parties concerned.

(b) If a satisfactory solution cannot be effected within the ten-day period, the officer will inform the employee of his right to submit his complaint as a formal grievance to the Director of the Agency (Step III). In such cases, the original of the employee's written presentation of his complaint will be returned to him with appropriate written comment.

(c) In exceptional circumstances, the officer may, with the consent of the employee, extend the ten-day limit in order to effect an equitable solution.

c. *Step III—Formal presentation of grievance to the Director*—The request for consideration by the Director must be identified as a grievance and must include the original written presentation to the Head of the organizational element to which he is assigned and that officer's written comments. The Office of the Director will refer the grievance to the Director of Personnel, who will establish an ad hoc Hearing Board.

512.5 The Hearing Board

a. *Authority*—The *ad hoc* Hearing Board, will have the authority to make investigations, and take such steps as it deems essential to obtain facts on which to predicate an impartial recommendation. The Hearing Board will recommend action to the Director but decisions with respect to action to be taken will be made only by the Director.

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	4
Conclusion	7

CITATIONS

Cases:

Farmers Bank v. *Federal Reserve Board*, 262 U.S. 649	6
Terre Haute & Ind. R. Co. v. *Indiana*, 194 U.S. 579	6
United States v. *Bowden*, 182 F. 2d 251	6
United States v. *Thoman*, 156 U.S. 353	6

Statutes:

5 U.S.C., Section 652(a)	5
28 U.S.C., Section 2201	2

Miscellaneous:

Federal Personnel Manual, Chapter E2	4
Treasury Department Personnel Circular No. 165 (March 27, 1952), Section 4(d)	6

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 115

JOHN A. HAYS, PETITIONER,

v.

ROBERT B. ANDERSON, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 40) is reported at 262 F. 2d 725.

JURISDICTION

The judgment of the Court of Appeals was entered on December 24, 1958 (R. 42) and a petition for rehearing was denied on February 12, 1959 (R. 50). On May 5, 1959, Mr. Chief Justice Warren entered an

order extending the time for filing a petition for a writ of certiorari until June 13, 1959 (Pet. 18). The petition for a writ of certiorari was filed on June 12, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether both courts below correctly held that petitioner was not denied any procedural rights in removal proceedings because he was not given a further hearing before a departmental grievance committee.

STATEMENT

Petitioner brought this action pursuant to 28 U.S.C. 2201 for a declaratory judgment that he was unlawfully removed from his position as Internal Revenue Agent, and for reinstatement (R. 1-7). The pertinent facts are as follows:

Petitioner, a non-veteran, formerly occupied a classified position in the Civil Service System as an Internal Revenue Agent for the Internal Revenue Service at Jacksonville, Florida. On March 23, 1955, petitioner was served with a letter of charges (R. 11-13) which he answered by his affidavit of March 30 (R. 13-17). A final notice of adverse action, dated April 13, 1955, informed petitioner that the charges against him had been sustained and that he was to be removed from the Service effective April 29, 1955[1] (R. 18-21).

[1] The charges against petitioner which were sustained were that: (1) while serving as a federal agent, he had prepared and filed false income tax forms for three consecutive years; (2) he had falsified an official report of the work he had done and had made false entries on the Daily Sign Out Sheet; and (3) he had insulted a taxpayer during a conference. Four specifications of one of the charges against petitioner were not sustained.

Following this notice, petitioner appealed to the Regional Commissioner, Internal Revenue Service.[2] He was granted an oral hearing on July 27, 1955, on which date he appeared with his counsel (R. 26, 27). The Regional Commissioner affirmed the removal (R. 26), and petitioner then appealed to the Commissioner of the Internal Revenue Service (R. 26-27). He was informed by letter of October 5, 1955, from Acting Commissioner Delk, that his removal had been sustained and his appeal denied (R. 27).

On October 14, 1955, petitioner appealed to the Director of Personnel of the Treasury Department and requested a hearing (R. 36). The Director of Personnel informed petitioner that he was not entitled to a hearing, but that he could submit additional written material if he wished (R. 36). Petitioner submitted additional information (R. 28). His appeal was denied on December 13, 1955 (R. 28). Petitioner again wrote to the Director of Personnel and renewed his request for a hearing (R. 28). The Director, in his reply of January 12, 1956, again denied this request and informed petitioner that he was not entitled to a hearing (R. 28). The Director further noted that petitioner had been afforded a hearing at the Regional Commissioner's Office in Atlanta (R. 27, 28).

Petitioner then brought this action claiming, *inter alia*, that the Treasury Department had violated Section 4(d) of its grievance procedure by denying him a hearing. The court rejected this contention and

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[2] Petitioner also appealed to the Civil Service Commission (R. 21). The Commission denied the appeal. While the legality of the Commission's ruling was challenged and resolved against petitioner in both courts below, he has explicitly abandoned that contention before this Court (Pet. 5).

granted the Government's motion for summary judgment (R. 10).

On appeal, the Court of Appeals for the District of Columbia Circuit affirmed *per curiam* (262 F. 2d 725). The court held that petitioner had not been denied any procedural rights by the Treasury Department.

ARGUMENT

Petitioner's sole contention is that the Treasury Department did not comply with its own regulations in removing him from Government service without a hearing before a grievance committee. He relies solely on a provision of the Department's grievance procedures which, he contends, makes such a hearing mandatory. But the grievance procedure upon which petitioner relies was not applicable to his administrative appeal.[3] Grievance procedures do not relate to removals, but deal with employee complaints arising in the day-to-day working relationships between employees or between an employee and his supervisor. See Chapter E2, Federal Personnel Manual (Pet. 29).

Petitioner contends (Pet. 12) that the Department's grievance procedure has been made applicable to removals of non-veterans. He relies, however, upon a memorandum to that effect issued by the District

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[3] This case, therefore, is significantly different from the decisions of this Court upon which petitioner relies (Pet. 7-8). For in those cases it was not denied that the official had not complied with his own regulations; the question was whether such non-compliance was excused by the fact that the procedures provided thereby were not required by statute. Here, however, the sole question is whether there has been compliance with the applicable regulations. The Government does not deny that, whatever might be the Secretary's authority to remove petitioner without a hearing in the absence of regulations, the Secretary must provide a hearing if the regulations make it mandatory.

Director of Internal Revenue in the Jacksonville, Florida, office (Pet. 12, 24-25). While the District Director had full authority to prescribe the appeal procedures for his office, he obviously had no authority to prescribe the procedures which would be followed by the Director of Personnel of the Treasury Department. The latter expressly told petitioner, in denying his request for a hearing, that any oral hearing which may have been required by the memorandum of the District Director "was a regional matter," and that "In so far as appeals to the Treasury Department are concerned there is no provision requiring an oral hearing, and therefore nothing was denied you" (R. 28).

Petitioner had no statutory right to a hearing. On the contrary, 5 U.S.C. 652(a), which governs removal or suspension from the classified civil service, expressly provides that "No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay." The statute requires only that a person whose removal or suspension is sought must (1) have notice of the charges preferred against him; (2) be furnished with a copy of the charges; (3) be allowed a reasonable time for filing a written answer to the charges, with affidavits; and (4) be furnished at the earliest possible date with a written decision on such answer. Petitioner concedes (Pet. 9), as indeed he must, that the foregoing procedural requirements were observed. Indeed, petitioner was given more favorable treatment than the statute requires, since he had a hearing at the regional office in Atlanta and several administrative appeals (see *supra*, pp. 2-3).

In the circumstances, we submit that both courts below correctly concluded that petitioner was not denied any procedural rights because he was not given a hearing before a departmental grievance committee.[4]

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[4] Even if the department's grievance procedures were applicable to removals, we submit that it is left to the discretion of the Secretary to grant or deny a hearing. The provision upon which petitioner relies, Section 4(d) of the grievance procedure (Personnel Circular No. 165) (March 27, 1952), provides that if an employee requests a hearing (Pet. 23, emphasis added), "a committee of three *may* be formed to hear and consider the grievance and make a recommendation" but that a committee "will not be formed to hear trivial complaints." The term "may" in ordinary meaning "carries no thought of compulsion—it is permissive or power giving and not at all compelling, discretionary, and not mandatory." *Lansdown* v. *Faris*, 66 F. 2d 939, 941 (C.A. 8). See also *United States* v. *Thoman*, 156 U. S. 353, 359; *Terre Haute & Ind. R. Co.* v. *Indiana*, 194 U.S. 579, 588. Accordingly, the word "may" in a statute has been uniformly construed "as permissive and to vest discretionary power, unless the context of the statute clearly indicates a purpose to use it in a mandatory sense." *United States* v. *Bowden*, 182 F. 2d 251, 252 (C.A. 10). See also *United States* v. *Thoman*, *supra*, at 359; *Farmers Bank* v. *Federal Reserve Board*, 262 U.S. 649, 662-663; and *Terre Haute & Ind. R. Co.* v. *Indiana*, *supra*, at 588.

The context in which the word "may" is used in Section 4(d) does not "clearly indicate a purpose to use it in a mandatory sense." On the contrary, the other provisions of Section 4(d) confirm the view that the Secretary intended the word "may" to have its normal meaning as permissive. For, in setting forth the composition and duties of a committee which "may" be formed under that section, the grievance procedure abandons permissive language and mandatorily provides that the committee "*will* be composed as follows * * *," that it "*shall* hear orally the employee presenting the grievance," and that after considering the evidence it "*will* make its report" to the Director of Personnel (Pet. 6, emphasis added). The fact that Section 4(d) provides that a grievance committee "will not be formed to hear trivial complaints" (Pet. 6) does not, as petitioner suggests (Pet. 11-12), reflect an intent to provide for such committee in all other cases. It means only that in cases of trivial complaints a request for a hearing will not even be considered. In more serious cases, however, the Department "may" form a committee if, in its discretion, that procedure is appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY, 1959.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1959 515330 116

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No. 115

FILED
SEP 22 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

JOHN A. HAYS, *Petitioner*

v.

ROBERT B. ANDERSON, Secretary of the Treasury, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION BY THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

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MOTION BY THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Applicant, The American Federation of Government Employees, by its counsel of record, hereby respectfully moves this Court for leave to file, as *amicus curiae*, a brief in this proceeding.

NATURE OF APPLICANT'S INTEREST

Applicant is a national organization of civilian federal government employees, consisting of approximately 70,000 members employed by the various departments and agencies of the government throughout the United States. The objects of the Federation are to promote the general welfare of civilian government

employees and efficiency in government service; and to protect federal employees against inequitable and discriminatory employment practices and procedures in the federal service.

Applicant's particular interest in this case rests in the following matters before the Court for determination:

1. At page 4 of their brief, respondents urge:

> "Grievance procedures do not relate to removals, but deal with employee complaints arising in the day-to-day working relationships between employees or between an employee and his superiors."

Applicant vigorously disagrees with this position, and begs leave to urge that, as a matter of law, grievance procedures, such as those adopted by the Treasury Department and other agencies of the government, do relate to removals of federal employees, and especially to removals of non-veteran employees who do not possess, under other statutes or procedures, substantial recourse or appeal on the merits or equity of any removal or discharge, irrespective of how unfair, malicious or inequitable the removal may be (*Service* v. *Dulles*, 354 U.S. 363, 77 S. Ct. 1152; *Watson* v. *The United States*, 355 U.S. 14, 78 S. Ct. 18). Applicant accordingly disagrees with respondent's sweeping assertion that grievance procedures are intended solely to govern relatively trivial complaints arising in day-to-day employment relationships.

2. In the case at bar, it would appear that the Treasury Department itself, contrary to the position now taken by respondents at page 4 of their brief, did construe its own grievance procedure to be applicable to removal (R. 21; Respondent's brief, p. 3). It would also appear that petitioner followed the grievance pro-

cedure prescribed in the Treasury regulations pursuant to Treasury's own invitation, and that Treasury itself participated in attempting to settle this removal grievance through at least three steps of the grievance procedure, up to and including the departmental levels of Commissioner of Internal Revenue and Director of Personnel of the Treasury Department (R. 26, 27, 28). But when Petitioner requested a hearing on the charges against him pursuant to the provisions of the Department's *own* grievance procedure, he was apparently advised that "it is not the policy of the Department to hold hearings on appeals in dismissal actions", and that "nothing was denied you" when the Department refused on "policy" grounds even to consider granting a hearing in line with its own grievance regulations (R. 28).

Applicant submits that once a federal department adopts a detailed grievance procedure to govern the settlement of employee grievances as a means of preventing "restraint, interference, coercion, discrimination or reprisal" in such matters; and once the department specifically notifies a federal employee in a removal case that he "may" appeal the removal decision under the department's grievance procedure; and once the employee elects so to appeal and the department itself participates in one or more summary or administrative steps of the grievance procedure, the department may not thereafter deny the discharged employee a fair and just hearing on the merits, as provided in the grievance procedure, by arbitrarily and unilaterally violating same and declaring, contrary to the department's own regulations, that "it is not the policy of the department to hold hearings".

The right to a hearing is the most precious step in the entire grievance procedure. And, of course, the

most precious right to be protected thereby is the federal employee's right not to be discharged or removed unfairly, maliciously or inequitably. The only level at which the accused can to any degree confront his accusers, and present his full case for determination is at the hearing level. Thus, the grievance procedure would be an hollow mockery indeed if same were to become inapplicable or be withheld in cases where it is most sorely needed to protect the innocent against oppression, discrimination and administrative mischief. And the same result would ensue just as surely as night follows day if a department, having granted the procedure and the protections afforded thereby, were permitted lawfully to violate its own procedures, or to apply same so arbitrarily and discriminatorily that a hearing is granted in relatively unimportant cases, while it is withheld in a removal case, involving grave charges against a government employee, on the ground that the former are serious enough for adjudication, while the discharge presents only "a trivial complaint" or is not within the "policy of the Department" with respect to hearings.

Applicant accordingly submits that the issues of this case, as same relate to the right of a federal employee to a hearing in removal cases, are of overwhelming importance, not only to petitioner, but to every government employee, especially those non-veteran employees who have no statutory right of appeal on the merits of charges brought against them by their superiors. It is submitted further that the Treasury Department's refusal even to consider the granting of a hearing to petitioner in a discharge case (as a matter of "policy") violated not only the department's own regulations and procedures, but also the rule established by the decisions of this Court in *United States ex rel.*

Accardi v. *Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499, 98 L. ed. 681; *Service* v. *Dulles*, *supra*, and *Watson* v. *The United States*, *supra*. The Department failed properly to exercise its discretion in a clearly serious discharge case, and, by so doing, it violated regulations patently applicable to petitioner's removal, having already recognized the applicability to petitioner's discharge of other closely related steps in the very same grievance procedure.

REASON FOR MOTION

As indicated above, applicant believes the basic issues of this case apply not only to petitioner, but to all federal employees, especially non-veterans, who must look to administrative grievance procedures as their main source of protection against inequitable removals and other punitive measures connected with their employment. This aspect of the case was not fully presented by the parties of record.

Finally, this motion is necessary because the attorneys for respondents would not consent to the filing of a brief by applicant as *amicus curiae*, and the Rules of this Court require such motion in the absence of consent by all parties.

CONCLUSION

It is respectfully submitted that this motion and the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September, 1959